



ONTARIO

REPORT OF

ONTARIO LAW REFORM COMMISSION

ON

THE LAW OF CONDOMINIUM



DEPARTMENT OF THE ATTORNEY GENERAL



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The Ontario Law Reform Commission was established by section 1 of The Ontario Law Reform Commission Act, 1964 for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

H. ALLAN LEAL, Q.C., LL.M., LL.D., *Chairman*

HONOURABLE JAMES C. McRUER, LL.D.

HONOURABLE RICHARD A. BELL, P.C., Q.C.

W. GIBSON GRAY, Q.C.

WILLIAM R. POOLE, Q.C.

Mr. William B. Common, Q.C., is Counsel to the Commission. The Secretary of the Commission is Miss A. F. Chute, and its offices are at Room 470, Parliament Buildings, Toronto, Ontario, Canada.



ONTARIO LAW REFORM COMMISSION

PARLIAMENT BUILDINGS
TORONTO 2

TO THE HONOURABLE A. A. WISHART, Q.C.,
Minister of Justice and Attorney General for Ontario.

Dear Mr. Attorney:

1. Under the provisions of section 2 of The Ontario Law Reform Commission Act, 1964, the Commission initiated a research study of the law of condominium in December, 1965 with a view to ascertaining whether legislation on this subject would be desirable in this jurisdiction and, if so, what form it should take.

2. The Commission engaged Professor R. C. B. Risk, of the Faculty of Law, University of Toronto, to do a comparative study of existing legislation in the Canadian provinces and other jurisdictions of the British Commonwealth and the United States. The Commission wishes to record its gratitude to Professor Risk for his most valuable assistance in all phases of the project.

3. The word "condominium" has received considerable publicity during the past few years, but the concept that the word denotes with respect to property may not yet be generally understood. The two essential elements of this concept are: first, the division of property into units, to be individually owned, and common elements, to be owned in common by the owners of the units; and, second, an administrative framework to enable the owners to manage the property. An example is a high-rise building containing residential units; each of the units is individually owned, and the remainder of the property, including the roof, the basement, the parking area and the gardens, is owned in common by the owners of the units. Another example is an industrial development including a cluster of small factories; each is individually owned and the remainder of the property, including the service facilities, is owned in common by the owners. In each, an administrative framework enables the owners to manage the property for the common benefit,

and each owner must contribute to the common expenses. This concept is indifferent to the use to be made of the property, to the design of the buildings, and to the location of the boundaries between individual and common ownership.

4. There is a demand for condominium development. The major reasons are probably the high cost of land in urban areas and the appeal of ownership. Condominium provides the amenities of apartment living on a shared cost basis with the advantages of home ownership. As contrasted with co-operative developments this type of ownership provides lower risks and greater flexibility in financing. Lower risks result from the fact that each unit in a condominium is separately taxed and individually financed and accordingly no unit owner is liable on the default of another. Again, because each unit is a separate property interest greater flexibility is achieved in that each owner is able to vary the financing to suit his needs and desires.

5. Most of the major countries of Western Europe enacted enabling legislation in the period roughly between 1930 and 1955. Many of the countries of South America followed in the next decade. In the United States, in 1961, the National Housing Act was amended to authorize the Federal Housing Authority to guarantee mortgages of condominium units. This amendment prompted an outburst of legislative activity, and now all but one of the States have enabling legislation. In the British Commonwealth, New South Wales enacted the Strata Titles Act in 1961, and British Columbia and Alberta enacted substantially similar statutes in 1966.

6. An obvious question to be faced at the outset is whether the enabling legislation for condominium development is necessary. The existing common law and legislation present formidable difficulties: the general prohibition of positive covenants running with the land makes the imposition of obligations on subsequent purchasers awkward or impossible; the rules of future interests limit and complicate provisions for the eventual termination of the interests of the owners; the attitude of the common law towards the ownership and subdivision of space may not be entirely clear; descriptions of cubes of space are more easily imagined than prepared; municipal taxes would probably be assessed against the property owned in common as one parcel, impairing the advantage of financial independence that might be expected to accompany ownership; mechanics' liens against the property owned in common would have the same effect; and, finally, the express provisions of planning restrictions on the subdivision of land would probably apply, even though the spirit might not.

7. These difficulties are not necessarily insurmountable. In many jurisdictions, particularly in England, the essential objectives have been achieved without enabling legislation, but the developments have presented a variety of weaknesses. In all, the techniques and the documents are complex and cumbersome, and some of the techniques are not suitable for large developments. In some developments, the interest of the owner is a long-term lease, an interest that is probably not suitable for

the North American housing market. None avoid the financial interdependence involved in municipal taxes and mechanics' liens. Despite the demand for condominium development, there has been virtually none in Ontario. This alone may be evidence of a need for legislation.

8. Enabling legislation will avoid some of the particular difficulties raised by the existing law, and perhaps more important, will present a relatively simple and comprehensive framework for development.

9. In order that the scheme of the proposed Bill will be clear from the outset, we offer a summary of its provisions. The owner in fee simple of land may invoke the Act by registering a declaration and description. The land is divided into units and common elements by the description. The units are to be individually owned; appurtenant to each is an undivided share in the common elements, and the proportions of the shares are specified in the declaration. The major terms that govern the owners and the property are specified in the Act and the declaration, and the declaration cannot be amended except by unanimous consent. The details of government are left to be specified in by-laws, which are made and may only be amended by a vote of members who own $66\frac{2}{3}$ per cent of the common elements, or such greater percentage as is specified in the declaration. The by-laws may also provide for the making of rules by the owners for the purpose of preventing unreasonable interference with the use and enjoyment of the property. These rules must be reasonable and consistent with the Act, the declaration, and the by-laws. A corporation without share capital, of which the members are the owners of the units, is automatically formed upon the registration of the declaration and description. This corporation is responsible for the performance of the functions of common concern. Of course, these functions cost money, and the owners must contribute to the cost in proportions specified in the declaration. Each owner is responsible for the maintenance of his own unit, and the corporation is responsible for the maintenance of the common elements and the repair of the entire property, although some of these obligations may be modified in the declaration. If there is extensive damage to the entire property, the owners who own 80 per cent of the common elements or such greater percentage as is specified in the declaration may vote to have the property repaired. Failing such a vote the owners become tenants in common of the land and interests appurtenant to the land. The assets of the corporation are distributed amongst the owners and the Act ceases to govern the property. A substantial majority of the owners may elect to sell the entire property or part of the common elements, or to withdraw the property from the provisions of the Act. The Act imposes some essential restrictions on the use of the property and none on design.

The declaration and by-laws may control occupation and use but not so as to discriminate because of race, creed, colour, nationality, ancestry or place of origin of any person. This provision is consonant with the spirit of The Ontario Human Rights Code which in terms applies to rental accommodation. Planning restrictions will undoubtedly affect both use and design.

10. A proposed Bill illustrating the form which the legislation might take is attached as an appendix to this report. In its preparation we had the invaluable assistance of L. R. MacTavish, Esq., Q.C., Senior Legislative Counsel, and R. E. Priddle, Esq., Assistant Inspector of Legal Offices.

All of which is respectfully submitted.

H. ALLAN LEAL,
Chairman

JAMES C. MCRUER,
Commissioner

RICHARD A. BELL,
Commissioner

W. GIBSON GRAY,
Commissioner

WILLIAM R. POOLE,
Commissioner.

March 6, 1967.

APPENDIX

EXPLANATORY NOTES

SECTION 1 (1) (e)

The common elements are the part of the property owned in common by the owners of the units. There is no compelling reason to add a list of examples, but two particular elements of the property might have been included in the common elements and excepted from the units: major structural elements and facilities for the provision of services to other units or to the common elements. The justification for the inclusion would be that no owner should have control over these elements and the power arbitrarily to injure the others. The inclusion would necessarily be made in general terms, and questions of boundaries and ownership should not be left to the interpretation of general terms. The possibility of abuse can be controlled by other techniques: the obligations to repair and the easements for support are adequate protection concerning the major structural elements, and easements are adequate protection concerning facilities for the provision of services.

SECTION 1 (1) (f)

The common expenses are the expenses of performance of the functions of common concern. The definition is in terms of expenditures. Although the owners must make contributions towards the common expenses, the total of their contributions need not necessarily be equal to the common expenses, for there may be income from other sources, for example, rent from units acquired through exercise of a restriction on sale or enforcement of the lien to secure the claim for contributions towards the common expenses.

The possibility of designating common expenses in the declaration will probably be rarely used, but is included to provide flexibility.

DRAFT BILL

An Act to facilitate the Division of Properties into Parts that are to be owned Individually and Parts that are to be owned in Common, and to provide for the Use and Management of such Properties

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1.—(1) In this Act,

Interpre-
tation

- (a) “board” means the board of directors of a corporation;
- (b) “buildings” means the buildings included in a property;
- (c) “by-law” means a by-law of a corporation;
- (d) “claim” includes a right, title, interest, encumbrance or demand of any kind affecting land, but does not include the interest of an owner in his unit and common interest;
- (e) “common elements” means all the property except the units; [*See note*]
- (f) “common expenses” means the expenses of the performance of the objects and duties of a corporation and any expenses specified as common expenses in a declaration; [*See note*]
- (g) “common interest” means the interest in the common elements appurtenant to a unit;
- (h) “corporation” means a corporation incorporated by this Act;

SECTION 1 (1) (*l*)

The owners of the units and common interests have a variety of rights and duties that are imposed by the Act, the declaration and the by-laws. The definition recognizes the possibility that there may be as many estates and interests in a unit and common interest as in any other real property, and that ownership may be divided.

SECTION 1 (1) (*n*)

The property is the property from which the units and common elements are carved.

SECTION 1 (1) (*r*)

The term "unit" is selected for reasons that are essentially negative; it has few, if any, familiar or particular connotations. "Lot" is associated with a two-dimensional parcel included in a traditional plan of subdivision, and "apartment" suggests residential use.

The owner of a unit owns space, the boundaries of which are specified in the description, and the material parts of the land within the space at the time of the registration of the declaration and description. Two alternative interests or combinations of interests might have been specified: first, an exclusive easement or similar right to use, but not ownership, and second, ownership of material parts of the land, an exclusive easement for the space occupied by these parts, and an exclusive easement or similar right to use the enclosed space. Neither of these possibilities is preferable to the interest contemplated by the definition, and the possibility of confusion and uncertainty precludes permitting a choice among alternatives.

Most of the statutes of other jurisdictions impose limitations on the design of the units, either expressly or by implication. Often, the units must be included in buildings. This definition and the remainder of the Act impose no limitations; a patio, a balcony, a loading area or a parking space may be included in a unit. Obviously, however, planning restrictions and the market will impose limitations.

SECTION 1 (2)

This section probably does no more than state the common law conception of the ownership of land, but the ownership of space is vital to the scheme of the Act, and there must be no possibility of doubt.

SECTION 2 (1) and (2)

The property may consist only of land and interests appurtenant to the land, and only the owner or owners in fee simple of the land may register the declaration and description and invoke the Act. A lessee, for example, may not. Some of the major advantages of the condominium concept would not be available if the property was a leasehold, and existing institutions and techniques probably permit lessees to achieve substantially the same objectives that the Act could offer.

Interests appurtenant to the land include, for example, restrictive easements and easements benefiting the land.

- (i) “declaration” means the declaration specified in section 3, and includes any amendments;
- (j) “description” means the description specified in section 4;
- (k) “encumbrance” means a claim that secures the payment of money or the performance of any other obligation, and includes a charge under *The Land Titles Act*, a mortgage and a lien; R.S.O. 1960, c. 204
- (l) “owner” means the owner or owners of the freehold estate or estates in a unit and common interest, but does not include a mortgagee unless in possession; [See note]
- (m) “prescribed” means prescribed by the regulations;
- (n) “property” means the land and interests appurtenant to the land described in the description, and includes any land and interests appurtenant to land that are added to the common elements; [See note]
- (o) “registered” means registered under *The Land Titles Act* or *The Registry Act*; R.S.O. 1960, cc. 204, 348
- (p) “regulations” means the regulations made under this Act;
- (q) “surveyor” means an Ontario land surveyor registered under *The Surveyors Act*; R.S.O. 1960, c. 389
- (r) “unit” means a part or parts of the land included in the description and designated as a unit by the description, and comprises the space enclosed by its boundaries and all the material parts of the land within this space at the time the declaration and description are registered. [See note]

(2) For the purposes of this Act, the ownership of land Ownership of land includes the ownership of space. [See note]

DECLARATION AND DESCRIPTION

2.—(1) A property shall comprise only freehold land and Freehold land only interests, if any, appurtenant to that land. [See note]

(2) A declaration and description may be registered by or Who may register on behalf of the owner in fee simple of the land described in the description. [See note]

(3) Where the land and the interests appurtenant to the land described in the description are not entirely within one land Land must be in one division titles or registry division or not entirely under *The Land Titles Act* or *The Registry Act*, the description shall not be registered.

SECTION 2 (4)

This subsection is a consequence of the requirement that only the owner or owners in fee simple of the land may register the declaration and description, and is designed to simplify searches of title.

SECTION 2 (5)

The registration of the declaration and description invokes the Act.

SECTION 3 (1)

The declaration, together with the Act, is, in effect, a constitution. The matters that must be included are, together with the Act, the essential minimum.

SECTION 3 (1) (b)

The property may be subject to a variety of claims at the time of the registration of the declaration and description. There is no necessity for a requirement of the consent of the owners of all these claims, but the consent of the owners of the claims that will be prejudiced by registration is undoubtedly justifiable. The only provisions prejudicing claims existing at the time of registration are contained in section 7 (5), which prohibits separating the ownership of a unit and common interest, section 7 (6), which prohibits partitioning or dividing the common elements, and section 7 (7), which prohibits enforcing an encumbrance against the common elements. These subsections all reflect the same general objective, and all prejudice the enforcement of encumbrances, albeit only slightly. Unregistered claims are excluded to enable a determination to be made from public records whether the requirements for invoking the Act have been fulfilled.

SECTION 3 (1) (c)

The proportions of the common interests determine the distribution of the property among the owners after termination and the voting power for major decisions. No standard is specified according to which the proportions are to be determined, although an estimate of the value that the units would otherwise have, will usually be the standard that is adopted.

SECTION 3 (1) (d)

The statutes of most other jurisdictions provide that the proportions for sharing the common expenses are to be the proportions of the common interests. The factors that might be considered in determining these two sets of proportions may be different, and discretion to specify different proportions provides flexibility, although in most developments the two will probably be the same.

SECTION 3 (2)

The owner or owners by whom the declaration and description are registered have discretion to add matters to the declaration.

SECTION 3 (2) (b)

Parts of the common elements, which for purpose of convenience can be called "limited common elements", may be restricted to use by some, or one, of the owners. For example, a high speed elevator to the top floor of a high-rise building might be limited to use by the owners of units on that floor, or a small swimming pool might be limited to use by the owners in one wing of a building. The owner of a unit might be permitted exclusive use of a balcony, a patio or a parking space. These areas might also be included in the unit and the respective merits of these two alternatives may vary with different kinds of developments.

SECTIONS 3 (2) (c) and (d)

The owners and the units are inevitably interdependent: a basic minimum of co-operation is necessary, and the common expenses must be shared. Restrictions on use and occupation under section 3 (2) (c) and on gifts, leases, and sales under section 3 (2) (d) must not discriminate on the grounds stipulated in The Ontario Human Rights Code. No precise terms of the basis for restriction are specified but if a restriction is to be included perhaps the most acceptable between control and marketability would be based on a right of first refusal given to the corporation.

(4) Where the land described in a description is under *The Registry Act*, a certificate of title under *The Certification of Titles Act* showing the owner by whom the declaration and description are being registered as the owner in fee simple of the land shall be registered before the declaration and description are registered. [See note]

Where the land is under the registry office system R.S.O. 1960, cc. 348, 48

(5) Upon registration of a declaration and description, the land and the interests appurtenant to the land described in the description are governed by this Act. [See note]

Effect of registration

3.—(1) A declaration shall not be registered unless it is executed by the owner or owners of the land and interests appurtenant to the land described in the description and unless it contains, [See note]

What declaration must contain

- (a) a statement of intention that the land and interests appurtenant to the land described in the description be governed by this Act;
- (b) the consent of all persons having registered encumbrances against the land or interests appurtenant to the land described in the description; [See note]
- (c) a statement, expressed in percentages, of the proportions of the common interests; [See note]
- (d) a statement, expressed in percentages allocated to the units, of the proportions in which the owners are to contribute to the common expenses; and [See note]
- (e) an address for service.

(2) In addition to the matters mentioned in subsection 1, a declaration may contain, [See note]

What declaration may contain

- (a) a specification of common expenses;
- (b) a specification of any parts of the common elements that are to be used by the owners of one or more designated units and not by all the owners; [See note]
- (c) provisions respecting the occupation and use of the units and common elements provided that no such provision shall discriminate because of the race, creed, colour, nationality, ancestry or place of origin of any person;
- (d) provisions restricting gifts, leases and sales of the units and common interests provided that no such provision shall discriminate because of the race, creed, colour, nationality, ancestry or place of origin of any person; [See note]

SECTION 3 (2) (j)

The search for a happy balance between discretion and control is a difficult undertaking, but this discretion is necessary. There are many details that may vary from development to development that the Act cannot encompass, and the future may bring unanticipated tastes and techniques.

SECTION 3 (3)

Provision must be made for amending the declaration, but since the terms are of vital economic and personal concern to each owner, the consent of all is required. Again, only the consent of the owners of the claims that will be prejudiced by the amendment is necessary. Only encumbrances are, or may be, prejudiced, and unregistered encumbrances are excluded.

SECTION 3 (4)

The requirement of registration ensures a public record of all amendments.

- (e) a specification of the number, qualification, nomination, election, term of office, compensation and removal of members of the board, and the meetings, quorum, functions and officers of the board;
- (f) a specification of duties of the corporation consistent with its objects;
- (g) a specification of the majority required to make by-laws of the corporation;
- (h) provisions regulating the assessment and collection of contributions towards the common expenses;
- (i) a specification of the majority required to make substantial changes in the common elements and the assets of the corporation;
- (j) a specification of any provision requiring the corporation to purchase the units and common interests of any dissenters after a substantial addition, alteration or improvement to or renovation of the common elements has been made or after the assets of the corporation have been substantially changed; [*See note*]
- (k) a specification of any allocation of the obligations to repair and to maintain the units and common elements;
- (l) a specification of the percentage of substantial damage to the buildings and a specification of the majority required to authorize repairs under section 17;
- (m) a specification of the majority required for a sale of the property or of part of the common elements;
- (n) a specification of the majority required for the termination of the government of the property by this Act;
- (o) any other matters concerning the property.

(3) All the owners and all persons having registered encumbrances against the units and common interests may amend the declaration. [*See note*]

(4) When a declaration is amended, the corporation shall register a copy of the amendment executed by all the owners and all persons having registered encumbrances against the units and common interests, and until the copy is registered the amendment is ineffective. [*See note*]

SECTION 4 (1)—THE DESCRIPTION

The major objectives are to describe the land and any interests appurtenant to the land, and to describe the units. The common elements are, by definition, all the property except the units. The land and the interests appurtenant to the land are described by familiar techniques. The units are described by reference to the buildings; that is, the buildings are the monuments by reference to which the boundaries of the units are specified. The details of the requirements for the description will be specified by the regulations.

SECTION 4 (1) (a)

The survey of the land is essential. The buildings must be included to provide a framework for the description of the units and a means of ensuring that the boundaries of the units are within the boundaries of the land; as well, the single survey will provide a convenient means of determining questions concerning encroachments and zoning by-laws.

SECTION 4 (1) (b)

The structural plans are required to provide a framework for the specification of the boundaries of the units and the diagrams of the units, and to ensure that plans will be available for repairs or reconstruction. If the building is a new one, the plans may simply be derived from the plans used for construction. If the building has been in existence for some time, the plans may have to be prepared.

SECTION 4 (1) (c)

The boundaries of the units are described by reference to the buildings; for example, the boundaries of a unit might be the planes of the interior surfaces of the perimeter walls, floor and ceiling. This technique is hardly novel, although its use in the contexts of registration and ownership is unfamiliar. A survey would usually be expensive and unnecessary.

SECTION 4 (1) (d)

These diagrams are simple drawings, and are intended to provide a convenient reference.

SECTION 4 (1) (e)

The certificate is required to ensure that the structural plans of the building are sufficiently accurate to enable restoration after damage, to ensure that the monuments by reference to which the units are described can be easily located and have substantially the same relations and dimensions in fact as in the plans, and to ensure that the buildings are completed before the Act is invoked. The buildings must be completed to avoid the possibility of hopeless confusion. If the Act could be invoked before or during construction, and if several units were sold when finished and the remainder were never finished, the proportions of common interests and for sharing common expenses would be meaningless, and no happy resolution of the difficulty can easily be made available.

SECTION 4 (1) (f)

These interests will be described by familiar techniques.

SECTION 4 (2)

The requirement of approval is justified by the unusual nature and the potential complexity of the description.

SECTION 5 (4)

The overwhelming majority of instruments affecting the property will deal with the units and common interests. These instruments do not fit comfortably into the traditional frameworks of abstract indices, registers and parcels. Appropriate variation in these frameworks will be made in the regulations, based primarily upon the concept of each unit and common interest as a separate parcel.

4.—(1) A description shall contain, [See note]

What
description
must
contain

- (a) a plan of survey showing the perimeter of the horizontal surface of the land and the perimeter of the buildings; [See note]
- (b) structural plans of the buildings; [See note]
- (c) a specification of the boundaries of each unit by reference to the buildings; [See note]
- (d) diagrams showing the shape and dimensions of each unit and the approximate location of each unit in relation to the other units and the buildings; [See note]
- (e) a certificate of a surveyor that the buildings have been constructed substantially in accordance with the structural plans and that the diagrams of the units are substantially accurate; and [See note]
- (f) a description of any interests appurtenant to the land that are included in the property, [See note]

prepared in accordance with the regulations.

(2) A description shall not be registered unless it has been approved in accordance with the regulations. [See note]

Approval of
description

REGISTRATION

5.—(1) Every master of titles and every registrar of deeds in whose office a declaration and description are registered shall keep an index in the prescribed form to be known as the “Condominium Corporations Index”.

Index

(2) Where a land titles office is combined with a registry office, one index under subsection 1 shall be kept for all declarations and descriptions registered in the combined offices.

Combined
offices

(3) Every master of titles and every registrar of deeds in whose office a declaration and description are registered shall keep a register in the prescribed form to be known as the “Condominium Register”.

Condomin-
ium
Register

(4) Declarations, descriptions, by-laws, notices of termination and other instruments respecting land governed by this Act shall be registered and recorded in the Condominium Register in accordance with this Act and the regulations but, except as otherwise provided by this Act and the regulations, *The Land Titles Act* or *The Registry Act*, as the case may be, applies in respect of property governed by this Act. [See note]

This Act to
govern
registrations,
etc.

R.S.O. 1960,
cc. 204, 348

SECTION 6 (1)

This subsection and subsection 2 are technically unnecessary, for the units must be parts of the land described in the description, but the objectives of the Act should be stated simply and clearly.

SECTION 6 (3)

The units are inevitably interdependent, and this subsection and subsection 4 are a reflection of this interdependence.

SECTION 7 (4)

The right of the owners to use the common elements is limited: one owner cannot make unreasonable impositions on the others. The word "reasonable" is indefinite, but an attempt to be precise would be futile, and the standard is probably easier to apply in a particular fact situation than it is to discuss generally.

SECTION 7 (5) and (6)

The prohibitions in subsection 5 and subsection 6 are essential. Separation of the ownership of a unit and common interest could achieve no useful or justifiable purpose, and would create an extremely complex tangle. Any division of the common elements might result in a paralysis of the property: the units might be useless without the right to use the common elements.

SECTION 7 (7)

The prohibitions in subsections 5 and 6 and the interest in the financial independence of the units demand that no encumbrance be enforced against the common elements.

SECTION 7 (8)

Instead of a claim against the common elements, the Act gives a claim against virtually the same security, and perhaps more. An encumbrance that could, but for the prohibition, be asserted against the common elements, may be asserted against the units and common interests.

SECTION 7 (9)

The interest in the financial independence of the units demands that each owner have the power to discharge his unit and common interest from the encumbrance by payment of a portion of the amount claimed. The portion is determined by the proportions for sharing the common expenses.

UNITS AND COMMON ELEMENTS

6.—(1) Units and common interests are real property for all purposes. *[See note]* Nature of units and common interests

(2) Subject to this Act, the declaration and the by-laws, each owner is entitled to exclusive ownership and use of his unit. Ownership of units

(3) No condition shall be permitted to exist and no activity shall be carried on in any unit or the common elements that are likely to damage the property. *[See note]* Dangerous activities

(4) The corporation or any person authorized by the corporation may enter any unit at any reasonable time to perform the objects and duties of the corporation. Right to enter

7.—(1) The owners are tenants in common of the common elements. Ownership of common elements

(2) An undivided interest in the common elements is appurtenant to each unit. Common interests

(3) The proportions of the common interests are those expressed in the declaration. Proportions

(4) Subject to this Act, the declaration and the by-laws, each owner may make reasonable use of the common elements. *[See note]* Use of common elements

(5) The ownership of a unit shall not be separated from the ownership of the common interest, and any instrument that purports to separate the ownership of a unit from a common interest is void. *[See note]* Ownership not to be separated

(6) Except as provided by this Act, the common elements shall not be partitioned or divided. *[See note]* No division

(7) No encumbrance is enforceable against the common elements after the declaration and description are registered. *[See note]* Encumbrances not enforceable

(8) Where but for subsection 7 an encumbrance would be enforceable against the common elements, the encumbrance is enforceable against all the units and common interests. *[See note]* Saving

(9) Any unit and common interest may be discharged from such an encumbrance by payment to the claimant of a portion of the sum claimed determined by the proportions specified in the declaration for sharing the common expenses. *[See note]* Discharge

(10) Upon payment of a portion of the encumbrance sufficient to discharge a unit and common interest, and upon Idem

SECTION 7 (11)

The prohibitions in subsections 5 and 6 and the interest in the financial independence of the units require a modification of the established patterns of municipal taxation. Without this subsection, the common elements would probably be a parcel; instead, the units and common interests are parcels. The interests in the common elements, and not the common elements, are taxable property.

SECTION 7 (12)

The problem of occupier's liability is complex, and the possibility of accidents in the common elements exposes the complexities in an extreme form. This subsection is designed to simplify the problems without effecting a substantial amendment of common law principles.

SECTION 8 (1) 1

The boundaries of the space included in the units are fixed at the time the declaration and description are registered; the material parts of the land that are included in the units are those that are included in this space at the time of registration. The buildings may sway or settle, and repairs may not restore the material elements to the original position. Where the boundaries of a unit are closely associated with parts of a building that are not in the original position, a trespass or several trespasses may occur. These easements are designed to take account of this possibility. The effect is simply that "the shadow follows the bear", and that there is an easement for exclusive use and occupation over the space that would be included in each unit if the boundaries were not fixed at the time of registration, but changed position as the monuments according to which they were specified changed position. This technique of determining the location of the easement will provide for virtually all possibilities, for virtually always a change in the position of a material part that results in a trespass or the possibility of a trespass will be or include a corresponding change in the monument according to which the boundary that is or may be exceeded was specified. In bizarre situations, in which there are possibilities that would not be provided for by this easement, appropriate easements can be included in the declaration.

SECTION 8 (1) 2

The Act imposes no limitations on the location of the boundaries of the units, and, therefore, there is a possibility that installations through which services are supplied to one unit may be included in another. This easement, coupled with the obligations concerning repairs, precludes the one owner from being deprived of services by the other.

SECTION 8 (1) 3

The easement for support may not accomplish any more than the obligations concerning repair, but is included for certainty.

demand, the claimant shall give to the owner a discharge of that unit and common interest in accordance with the regulations.

(11) For the purposes of municipal assessment and taxation, ^{Assessment} each unit and common interest constitute a parcel, and the common elements do not constitute a parcel. [See note]

(12) For the purpose of determining liability resulting from ^{Where} breach of the duties of an occupier of land, the corporation ^{corporation} shall be deemed to be the occupier of the common elements ^{deemed to} and the owners shall be deemed not to be occupiers of the ^{be occupier} common elements. [See note]

EASEMENTS

8.—(1) The following easements are appurtenant to each ^{Easements} unit: ^{appurtenant} ^{to units}

1. Where a building or any part of a building,
 - (a) moves after registration of the declaration and description; or
 - (b) after having been damaged and repaired, is not restored to the position occupied at the time of registration of the declaration and description,

an easement for exclusive use and occupation in accordance with this Act, the declaration and the by-laws, over the space of the other units and common elements that would be space included in the unit if the boundaries of the unit were determined by the position of the buildings from time to time after registration of the description and not at the time of registration. [See note]

2. An easement for the provision of any service through any installation in the common elements or any other unit. [See note]
3. An easement for support by the common elements and any other unit capable of providing support. [See note]

(2) The following easements are appurtenant to the common ^{Easements} elements: ^{appurtenant} ^{to common} ^{elements}

1. An easement for the provision of any service through any installation in any unit.
2. An easement for support by any unit capable of providing support.

SECTION 9 (1)

A corporation without share capital is the most simple and convenient form in which the owners collectively can perform the functions of common concern.

SECTION 9 (2)

The name of the corporation will be based primarily on a number. Of course, the owner or owners by whom the declaration and description are registered may coin a more romantic name for the development for other purposes.

SECTION 9 (4)

This general statement of the objects of the corporation is designed to permit any undertaking that legitimately concerns the property and the common interests of the owners.

SECTION 9 (5)

The board and the minimum requirements specified in this subsection and subsections 4 to 7 are vital, and cannot be left entirely to the declaration and by-laws.

SECTION 9 (10)

The nature of developments will differ greatly, and the Act cannot specify one form for all; furthermore, there will be many details that can and should be subject to amendment by some majority, and not the unanimous consent required for amendment of the declaration.

SECTION 9 (11)

These provisions might have been left to the declaration or the by-laws, but seem sufficiently important to be established in the Act.

SECTION 9 (12)

The corporation is responsible for the general supervision of the affairs of the owners. The duty is to each of the owners and to persons having encumbrances against the units and common interests.

CORPORATION

9.—(1) The registration of a declaration and description ^{Creation} creates a corporation without share capital whose members are the owners from time to time. [See note]

(2) When a declaration and description are registered, the ^{Name of corporation} master of titles or registrar of deeds in whose office they are registered shall assign a name to the corporation in accordance with the regulations. [See note]

(3) *The Corporations Act* and *The Corporations Information Act* do not apply to the corporation. ^{R.S.O. 1960, cc. 71, 72 do not apply}

(4) The objects of the corporation are to manage the prop- ^{Objects} erty and any assets of the corporation. [See note]

(5) The affairs of the corporation shall be managed by a ^{Board of directors} board of directors, consisting of three persons or such greater number as the declaration or by-laws may provide, elected by the members of the corporation. [See note]

(6) The term of the members of the board shall be three ^{Term} years or such lesser period as the declaration or by-laws may provide, but the members of the board may continue to act until their successors are elected, and members are eligible for re-election.

(7) If a vacancy in the membership of the board occurs, a ^{Vacancies} new member shall be elected by the members of the corporation.

(8) A quorum for the transaction of business is a majority ^{Quorum} of the members of the board or such greater number as the declaration or by-laws may provide.

(9) The acts of a member of the board or an officer of the ^{Defects} board are valid notwithstanding any defect that may afterwards be discovered in his election or qualifications.

(10) The declaration or the by-laws may specify and regu- ^{Officers and executive} late the qualification, nomination, election, compensation and removal of members of the board, and the meetings, functions and officers of the board. [See note]

(11) The corporation shall keep adequate records, and any ^{Records} member of the corporation may inspect the records on reasonable notice and at any reasonable time. [See note]

(12) The corporation has a duty to effect compliance by ^{Duty to effect compliance} the owners with this Act, the declaration and the by-laws. [See note]

SECTION 9 (13)

The power to specify duties is given for flexibility.

SECTION 9 (14)

The owners are given this right because of their intense concern with the functions of the corporation. The reason for including persons having encumbrances is derived primarily from a concern with mortgages (and charges). There are two general factors that make mortgages of the units and common interests different from mortgages of conventional property, and that may impair the security: the ownership of common elements is divided among all the owners, and the owners collectively have a vital interest in controlling the property and the individual owners. If the security is unattractive, loans will simply not be made, at least, not readily and not at conventional rates of interest. This subsection gives mortgagees some leverage and control over the management of the property.

SECTION 9 (15)

Only land and interests appurtenant to the land may be included in the property. A developer may wish to give prospective owners the benefit of property interests that may not be included in the property, for example, a lease of a small golf course. One method of achieving this practice is to convey the interests to the corporation.

The corporation may own a variety of incidental items, and may acquire a unit and common interest through enforcement of the lien for unpaid common expenses or exercise of a restriction on gifts, leases or sales.

SECTION 9 (17)

The corporation is created for the administrative convenience of the owners. It is not a commercial or business enterprise, and its activities and commitments are for the sole benefit of the owners, but it will have few, if any, assets. Therefore personal liability is imposed on the owners, although for only a portion of a judgment, determined by the proportions for sharing the common expenses.

SECTION 9 (18)

This subsection is included entirely for procedural convenience.

SECTION 10 (1)

Requirements and tastes differ and change; the Act cannot specify every detail for every development, and considerable discretion must be left to the owner or owners who register the declaration and description and to the subsequent owners. The Act and the declaration specify the major elements of the framework that governs the owners and the property, and the declaration cannot be amended except by unanimous consent. There are many details that must be determined, but that are not of the same fundamental nature and for which less rigorous requirements for amendment are appropriate. These details may be specified in by-laws.

The choice of particular minimum majority is difficult and perhaps essentially arbitrary. $66\frac{2}{3}$ per cent is chosen to balance the competing interests of stability and flexibility. The voting power is allocated according to the proportions of the common interests to recognize the economic stake of the owners in the property.

The scope of the by-laws is sufficiently broad to include any subjects of common concern to the owners that are not determined by the Act or the declaration, or that are not expressly excepted.

(13) The declaration or the by-laws may specify duties of ^{Duties} the corporation consistent with its objects. [*See note*]

(14) Each member of the corporation, and each person ^{Right to performance of duties} having an encumbrance against a unit and common interest, has the right to the performance of any duty of the corporation specified by this Act, the declaration and the by-laws. [*See note*]

(15) The corporation may own, acquire, encumber and ^{Real and personal property} dispose of real and personal property for the use and enjoyment of the property. [*See note*]

(16) The members of the corporation share the assets of ^{Interest in assets} the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

(17) A judgment for the payment of money against the ^{Judgments against corporation} corporation is also a judgment against each owner at the time the cause of action arose for a portion of the judgment determined by the proportions specified in the declaration for sharing the common expenses. [*See note*]

(18) Any action with respect to the common elements may ^{Actions by corporation respecting common elements} be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation. [*See note*]

(19) When the owners and the property cease to be ^{Termination} governed by this Act,

(a) the assets of the corporation shall be used to pay any claims for the payment of money against the corporation;

(b) the remainder of the assets of the corporation shall be distributed among the members of the corporation in the same proportions as the proportions of their common interests.

BY-LAWS

10.—(1) The corporation may, by a vote of members who ^{By-laws} own $66\frac{2}{3}$ per cent, or such greater percentage as is specified in the declaration, of the common elements, make by-laws, [*See note*]

SECTION 10 (1) (b) and (c)

The declaration may include any provisions respecting use and occupation. The scope of the by-laws is limited: the use of the common elements may be regulated, but not occupation. The use of the units may be regulated only for a limited purpose: to control anti-social or annoying conduct.

SECTION 10 (1) (d)

The obligations concerning maintenance are primarily determined by section 16. This power permits the details, particularly the standard, to be determined by by-laws.

SECTION 10 (2)

The qualification of "reasonableness" imposed on changes by the owners is intended to protect a minority from unfair treatment by a majority. The qualification is obviously indefinite, but again, any attempt to design a more precise one would be futile, and the standard of reasonableness is probably much easier to apply in a specific situation than to discuss generally.

SECTION 10 (3)

The requirement of registration is designed to provide a formal, public record of the change. The certificate is required for convenience.

SECTION 11

The owners may wish to impose minor rules of conduct on the use of the common elements, particularly in large projects. This kind of regulation is not appropriate to the by-laws. This section provides for the establishment by the by-laws of a method in which these rules of conduct can be made in a more informal fashion. The informality and the possibility of change by a simple majority are controlled by the limited scope of the power.

SECTION 12 (1)

The problems of positive covenants running with the land are avoided by legislative fiat.

- (a) governing the management of the property;
- (b) governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units; [*See note*]
- (c) governing the use of the common elements; [*See note*]
- (d) regulating the maintenance of the units and common elements; [*See note*]
- (e) governing the use and management of the assets of the corporation;
- (f) respecting the board;
- (g) specifying duties of the corporation;
- (h) regulating the assessment and collection of contributions towards the common expenses;
- (i) respecting the conduct generally of the affairs of the corporation.

(2) The by-laws shall be reasonable and consistent with this Act and the declaration. [*See note*]

By-laws
must be
reasonable

(3) When a by-law is made by the corporation, the corporation shall register a copy of the by-law together with a certificate executed by the corporation that the by-law was made in accordance with this Act, the declaration and the by-laws, and until the copy and certificate are registered the by-law is ineffective. [*See note*]

Registration

RULES GOVERNING USE OF COMMON ELEMENTS

11.—(1) The by-laws may provide for the making of rules by the owners respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and the common elements. [*See note*]

House
rules

(2) The rules shall be reasonable and consistent with this Act, the declaration and the by-laws.

Idem

(3) The rules shall be complied with and enforced in the same manner as the by-laws.

Compliance
and
enforcement

OBLIGATIONS OF OWNERS

12.—(1) Each owner is bound by and shall comply with this Act, the declaration and the by-laws. [*See note*]

Obligations
and rights
of owners,
etc.

SECTION 12 (2)

The right of each of the owners is justified by the interdependence of the owners and the units: the right to have the duties of the other owners enforced by the corporation may not always be a satisfactory one.

SECTION 12 (3)

Obviously, the corporation must have the right to the performance of the duties of the owners, and again, mortgagees are given some leverage and control over the management of the property.

SECTION 13 (3)

The line between abandonment and sale or gift may be difficult to determine in particular situations, but the problem is one that is appropriate for adjudication by the courts.

SECTION 13 (4)

Although one of the major objectives of the Act is financial independence of the owners and the units, interdependence is inevitable: the common expenses must be paid, even though an owner defaults. The lien is given to the corporation to diminish this interdependence, and to provide an efficient means of collection.

SECTION 13 (5)

The lien is novel, but the novelty is diminished by invoking an established and familiar institution: the mortgage.

SECTION 14 (1)

Section 16 deals with repair and maintenance, that is, with the preservation of the property in the original form. Some owners may wish to undertake substantial changes. The units are the private concern of each owner, but the possibility of changes in the common elements includes the possibility of a conflict. Some owners may wish to have additions made to the land or buildings, they may wish to have improvements made, or they may wish to have complete renovations. Their wishes may be reasonable, but other owners may be strongly opposed. This conflict must be resolved, and the terms of the resolution must inevitably be a reflection of emotional or political attitudes. The Act imposes substantial restrictions on these undertakings. Again, the voting power is allocated according to the proportion of the common interests to recognize the economic stake of the owners in the property.

The standard "substantial" is indefinite, but again, any attempt to design a more precise one would be futile, and the standard is probably much easier to apply in a particular situation than to discuss generally.

SECTION 14 (2)

This subsection is probably not necessary, but is included for clarity and certainty.

(2) Each owner has a right to the compliance by the other ^{Idem} owners with this Act, the declaration and the by-laws. [*See note*]

(3) The corporation, and any person having an encum- ^{Right of corporation and encumbrancers} brance against any unit and common interest, has a right to the compliance by the owners with this Act, the declaration and the by-laws. [*See note*]

13.—(1) The owners shall contribute towards the common ^{Duty of owners to contribute to common expenses} expenses in the proportions specified in the declaration.

(2) The assessment and collection of contributions towards ^{Assessment and collection} the common expenses may be regulated by the declaration or the by-laws.

(3) The obligation of an owner to contribute towards the ^{No avoidance} common expenses shall not be avoided by waiver of the right to use the common elements or by abandonment. [*See note*]

(4) Where an owner defaults in his obligation to contribute ^{Lien} to the corporation towards the common expenses, the corporation, upon registration of a notice of lien in the prescribed form, has a lien for the unpaid amount against the unit and common interest of that owner. [*See note*]

(5) The lien may be enforced in the same manner as a ^{How enforceable} mortgage. [*See note*]

(6) Upon payment of the unpaid amount and upon demand, ^{Discharge} the corporation shall give the owner a discharge in the prescribed form.

MODIFICATIONS OF COMMON ELEMENTS AND ASSETS

14.—(1) The corporation may by a vote of members ^{Substantial alterations} who own 80 per cent, or such greater percentage as is specified in the declaration, of the common elements make any substantial addition, alteration or improvement to or renovation of the common elements or may make any substantial change in the assets of the corporation, and the corporation may by a vote of a majority of the members make any other addition, alteration or improvement to or renovation of the common elements or may make any other change in the assets of the corporation. [*See note*]

(2) The cost of any addition, alteration or improvement ^{Cost} to or renovation of the common elements and the cost of any substantial change in the assets of the corporation are common expenses. [*See note*]

SECTION 14 (3)

The knowledge that at least 80 per cent of the owners are in favour of the installation of a swimming pool may not be much satisfaction for an owner who loves a garden that will disappear, who does not swim, who is opposed to the noise a pool will create, and who cannot afford to share the cost. The declaration may include the additional protection of requiring the corporation to purchase the unit and common interest of a dissenter.

SECTION 15 (1)

This section concerns insurance against damage to the property. This is undoubtedly one of the most difficult problems of condominium development. The difficulty is created by the inevitable interdependence of the owners and the units, and a conflict of interests each of which must be satisfied.

The interest of the owners in insurance is derived from ownership, and the potential obligation to repair, which may not be coincident with ownership. Protection of these interests by individual policies obtained by each of the owners on each unit and common interest has severe weaknesses. The total cost of the policies would probably be higher than the cost of a single policy on the entire property, and probably some specialized policies would be left to be separately acquired, again, at a relatively high cost. The interdependence of the owners and the units, manifested particularly in the obligations to repair, creates a mutual interest and dependence upon comprehensive insurance coverage and unified control of proceeds, and this interest cannot be satisfied simply by requiring rather than permitting the owners to insure. A master policy on the entire property obtained by the corporation will usually be preferable, and the obligations of the corporation to repair give it an insurable interest in the entire property. Section 15 (1) permits the obligation to obtain insurance to be imposed on the corporation. The owners may insure as owners, and the doctrine of subrogation will prevent double recovery.

Doubtless most of the units and common interests will be mortgaged (or charged), at least at the outset, and the mortgagee will require insurance protection for the security. A conflict is posed between the interest of the mortgagees or chargees in control of insurance payments after loss in electing payment or reconstruction, and the interest of the owners in unified control. This conflict may be resolved by the use of separate policies on the interests of mortgagees.

SECTION 16 (1)

The interdependence of the owners and the units and common interests requires that obligations be imposed to maintain the property and to repair after damage, and these obligations obviously must be imposed either on the corporation or the owners.

The obligation concerning the common elements must generally be assigned to the corporation; if not, performance of the functions would require the control over the owners that is the essence of the corporation. There can be at least one exception to this general proposition: the maintenance of limited common elements. The cost of maintenance done by the corporation could be taken into account in determining the proportions for sharing the common expenses, but maintenance by the corporation might be awkward where the limited common elements were closely associated with one unit and restricted to use by the owner of that unit. The Act imposes the obligations of repair and maintenance on the corporation, and permits the declaration to shift the obligation to maintain to the owners.

The units present greater difficulty. Maintenance is substantially a personal concern, and generally should be the responsibility of the owner. Again, there is at least one possible exception: in some projects the boundaries of the units may be the exterior surface of the walls of the building; if so, maintenance of these walls by the corporation may be desirable. The Act imposes the obligation of maintenance on the owner, and permits the declaration to shift the obligation to the corporation.

The imposition of obligations to repair the units after damage is the most difficult problem. Perhaps the natural and instinctive reaction is that the obligation should be imposed on the owner, but strong objections can be made to this scheme. The boundaries between units and between units and the common elements may be planes through parts of the building, and damage may not discriminate according to the boundaries. The task of determining liability and controlling repairs may be formidable, and may involve nothing more than a guess. Section 17 provides that if there is substantial damage, the owners may choose between termination and repair. To shift from individual to common liability where there has been substantial damage, however

(3) The declaration may provide that if any substantial ^{Dissenters} addition, alteration or improvement to or renovation of the common elements is made, or if any substantial change in the assets of the corporation is made, the corporation must, on demand of any owner who dissented, purchase his unit and common interest. [See note]

(4) Where the corporation and the owner who dissented ^{Arbitration} do not agree as to the purchase price, the owner who dissented may elect to have the fair market value of his unit and common interest determined by arbitration under *The R.S.O. 1960, Arbitrations Act* ^{c. 18} by serving a notice to that effect on the corporation.

INSURANCE

15.—(1) A corporation shall insure its liability to repair ^{Duty to insure} the property after damage resulting from fire, tempest or other casualty to the extent required by the declaration or the by-laws. [See note]

(2) Subsection 1 does not restrict the capacity of any ^{Saving} person to insure otherwise than as provided in that subsection.

REPAIRS AND MAINTENANCE

16.—(1) For the purposes of this Act, the obligation to <sup>Interpre-
tation</sup> repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to units after registration of the declaration and description. [See note]

(2) Subject to section 17, the corporation shall repair the ^{Duty to repair} units and common elements after damage.

(3) The corporation shall maintain the common elements. ^{Maintenance of common elements}

(4) Each owner shall maintain his unit. ^{Maintenance of units}

(5) Notwithstanding subsections 2, 3 and 4, the declaration ^{Declaration may provide otherwise} may provide that,

(a) each owner shall, subject to section 17, repair his unit after damage;

(b) the owners shall maintain the common elements or any part of the common elements; or

(c) the corporation shall maintain the units.

(6) The corporation shall make any repairs that an owner <sup>Where cor-
poration to
make
repairs for
owners</sup> is obligated to make and that he does not make within a rea-
sonable time.

the determination is made, seems arbitrary. Presumably, there will be insurance against most damage, obtained by the corporation, the cost of which is a common expense. The cost of repairs is, to the extent of the insurance proceeds, shared among all the owners. To shift from common to individual responsibility when insurance proceeds are exhausted, again, seems arbitrary.

The imposition of the obligation to repair on the corporation avoids these objections, but raises a different problem: the vital distinction between repair and maintenance. These terms considered alone may include a wide range of possible meanings, which may vary according to the context, and which may overlap. The Act specifies that they are mutually exclusive. The obligation to repair is confined to repair of damage, and maintenance is limited to "good housekeeping". The Act imposes the obligation to repair after damage on the corporation, and permits the declaration to shift the obligation to the owners. Of course, if the corporation must repair and damage is caused by the fault of an owner, a claim for indemnity is available; no express provision is required to establish this claim.

SECTION 17 (1)

Damage may be so extensive that repair may not be reasonable. The Act gives the owners a choice, to be made by vote, between termination and repair.

The phrase, "substantial damage" is, of course, indefinite, but there is no better alternative. The objective in determining the specific percentage is to designate the point at which damage may be so disruptive that termination is a reasonable alternative. The figure of 25 per cent may be changed in the declaration.

SECTION 17 (2)

Again, the voting power is allocated according to the proportion of the common interests to recognize the economic stake of the owners in the property.

SECTION 18 (1)

The notice is required to provide a formal, public record of the change.

SECTION 18 (3) (d) and (e)

Liens against the units and the common interests are preserved as claims against the new interests of the owners. Other claims created after the registration of the declaration and description are extinguished. The possibility of this kind of claim is remote; an example is a restrictive covenant concerning a unit. To extinguish these claims may seem arbitrary, but to preserve them in any fair and workable scheme is probably impossible: the interests against which they were asserted have vanished.

(7) An owner shall be deemed to have consented to have ^{Consent} repairs done to his unit by the corporation.

WHERE DAMAGE OCCURS

17.—(1) Where damage to the buildings occurs, the board shall determine within thirty days of the occurrence whether <sup>Determina-
tion of
damage</sup> there has been substantial damage to 25 per cent, or such greater percentage as is specified in the declaration, of the buildings. [*See note*]

(2) Where there has been a determination that there has <sup>Vote for
repair</sup> been substantial damage to 25 per cent, or such greater percentage as is specified in the declaration, and owners who own 80 per cent of the common elements, or such greater percentage as is specified in the declaration, vote for repair within sixty days of the determination, the corporation shall repair. [*See note*]

TERMINATION

18.—(1) Where on a vote the owners do not vote for repair, <sup>Termination
by notice
after
substantial
damage</sup> the corporation shall, within ten days of the vote, register a notice of termination in the prescribed form. [*See note*]

(2) Where there has been no vote within sixty days of the ^{Idem} determination that there has been substantial damage under subsection 1 of section 17, the corporation shall, within ten days after the expiry of the 60-day period, register a notice of termination in the prescribed form.

(3) Upon the registration of a notice of termination under <sup>Effect of
registration
of notice</sup> subsection 1 or 2,

- (a) the government of the property by this Act is terminated;
- (b) the owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests;
- (c) claims against the land and interests appurtenant to the land created before the registration of the declaration and description are as effective as if the declaration and description had not been registered;
- (d) encumbrances against each unit and common interest created after the registration of the declaration and description are claims against the interest of the owner in the land and interests appurtenant to the land described in the description, and have the same priority they had before the registration of the notice of termination; and [*See note*]

SECTION 19 (1)

This section permits the owners to sell the property or part of the common elements and terminate the government of the Act. A majority of at least 80 per cent is required, but not unanimity. A minority may protest that they are being deprived of their property by the desires of the majority, but this possibility is preferable to permitting one or a few obstinate owners to veto a reasonable proposal. Again, the voting power is allocated according to the proportion of the common interests to recognize the economic stake of the owners in the property.

SECTION 19 (1) (b)

These claims will be extinguished, and there is no reason why the consents should not be required. The requirement is limited to registered claims to enable a determination to be made from the public records whether the requirements have been fulfilled.

SECTION 19 (3)

To provide a public record of the change, the time at which the terms of the Act cease to govern the property is designated as the time of the registration of the deed or transfer.

SECTION 19 (3) (c)

These terms must contemplate extinguishing the claims created after the registration of the declaration and description because the interests against which they would be asserted are extinguished. There is no provision for a sale of the property governed by the Act by majority vote simply because interest in this possibility is extremely unlikely.

SECTION 19 (5)

There are two major possibilities that may prejudice the minority: bad faith and bad judgment of the majority. This provision might have been made an optional feature of the declaration if protection against bad faith would clearly be available in the absence of express protection, and also if the terms of this protection were reasonably clear. Instead, protection is provided against a sale at less than the fair market value regardless of the reason.

- (e) all claims against the property created after the registration of the declaration and description, other than the encumbrances mentioned in clause *d*, are extinguished. [*See note*]

19.—(1) Sale of the property or any part of the common elements may be authorized, [*See note*]

Termination
by sale

- (a) by a vote of owners who own 80 per cent, or such greater percentage as is specified in the declaration, of the common elements; and
- (b) by the consent of the persons having registered claims against the property or the part of the common elements, as the case may be, created after the registration of the declaration and description. [*See note*]

(2) A deed or transfer shall be executed by all the owners and a release or discharge shall be given by all the persons having registered claims against the property or the part of the common elements, as the case may be, created after the registration of the declaration and description.

Execution
of con-
veyance

(3) Upon the registration of the instruments mentioned in subsection 2, [*See note*]

Effect of
registra-
tion of
conveyance

- (a) the government of the property or of the part of the common elements by this Act is terminated;
- (b) claims against the land and interests appurtenant to the land created before the registration of the declaration and description are as effective as if the declaration and description had not been registered; and
- (c) claims against the property or the part of the common elements created after the registration of the declaration and description are extinguished. [*See note*]

(4) Subject to subsection 5, the owners share the proceeds of the sale in the same proportions as their common interests.

Proceeds

(5) Where a sale is made under this section, any owner who dissented may elect to have the fair market value of the property at the time of the sale determined by arbitration under *The Arbitrations Act* by serving notice to that effect on the corporation within ten days after the vote, and the owner who served the notice is entitled to receive from the proceeds of the sale the amount he would have received if the sale price had been the fair market value as determined by the arbitration. [*See note*]

Rights of
dissenters

R.S.O. 1960,
c. 18

SECTION 20 (1)

This section permits the owners to terminate the government of the property by this Act and to become tenants in common. Again, the voting power is allocated according to the proportion of the common interests to recognize the economic stake of the owners in the property.

SECTION 20 (1) (b)

Again, these claims will be extinguished, and there is no reason not to require consent.

SECTION 20 (2)

Again, the registration of the notice is required to provide a formal, public record.

(6) Where the proceeds of the sale are inadequate to pay the amount determined under subsection 5, each of the owners who voted for the sale is liable for a portion of the deficiency determined by the proportions of their common interests. ^{Where proceeds inadequate}

20.—(1) Termination of the government of the property by this Act may be authorized, [See note] ^{Termination by notice without sale}

(a) by a vote of owners who own 80 per cent, or such greater percentage as is specified in the declaration, of the common elements; and

(b) by the consent of the persons having registered claims against the property created after the registration of the declaration and description. [See note]

(2) Where termination of the government of the property by this Act is authorized under subsection 1, the corporation shall register a notice of termination in the prescribed form, executed by all the owners and all the persons having registered claims against the property created after the registration of the declaration and description. [See note] ^{Registration of notice}

(3) Upon registration of a notice of termination under subsection 2, ^{Effect of registration}

(a) the government of the property by this Act is terminated;

(b) the owners are tenants in common of the land and interests appurtenant to the land described in the description in the same proportions as their common interests;

(c) claims against the land and the interests appurtenant to the land described in the description created before the registration of the declaration and description are as effective as if the declaration and description had not been registered;

(d) encumbrances against each unit and common interest created after the registration of the declaration and description are claims against the interest of the owner in the land and interests appurtenant to the land described in the description and have the same priority as they had before the registration of the notice of termination; and

(e) all other claims against the property created after the registration of the declaration and description are extinguished.

SECTION 22

The comments made concerning section 10 (3) described factors that may impair the security of a mortgagee. This subsection recognizes and regulates the probable consequences: mortgagees will demand some control over the administration of the property.

21.—(1) A corporation, any owner, or any person having an encumbrance against a unit and common interest may apply to the Supreme Court for an order terminating the government of the property by this Act. ^{Termination by S.C.O.}

(2) The Court may order that the government of the property by this Act be terminated if the Court is of the opinion that the termination would be just and equitable, and, in determining whether the termination would be just and equitable, the Court shall have regard to,

- (a) the scheme and intent of this Act;
- (b) the probability of unfairness to one or more owners if termination is not ordered; and
- (c) the probability of confusion and uncertainty in the affairs of the corporation or the owners if termination is not ordered.

(3) Where an order of termination is made under sub-section 2, the Court may include in the order any provisions that the Court considers appropriate in the circumstances. ^{Ancillary matters}

VOTING BY MORTGAGEES

22. Where a mortgage or charge of a unit and common interest contains a provision that authorizes the mortgagee or chargee to exercise the right of the owner to vote or to consent, the mortgagee or chargee may exercise the right, and, where two or more such mortgages or charges contain such a provision, the right may be exercised by the mortgagee or chargee who has priority. [*See note*] ^{Rights of mortgagees}

PERFORMANCE OF DUTIES

23.—(1) Where a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, any owner, or any person having an encumbrance against a unit and common interest may apply to the Supreme Court for an order directing the performance of the duty. ^{Application for order to require performance of duties}

(2) The Court may by order direct performance of the duty, and may include in the order any provisions that the Court considers appropriate in the circumstances. ^{Idem}

(3) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act. ^{Saving}

APPLICATION OF THE PLANNING ACT

Application
of sub-
division
control
R.S.O. 1960,
c. 296

24.—(1) Section 26 and clause *b* of subsection 1 of section 27 of *The Planning Act* do not apply in respect of dealings with units and common interests.

Approval of
descriptions
under
R.S.O. 1960,
c. 296, s. 28

(2) Subject to subsection 3, the provisions of section 28 of *The Planning Act* that apply to plans of subdivision apply *mutatis mutandis* to descriptions under this Act, and a description shall not be registered unless approved or exempted by the Minister of Municipal Affairs.

Exemption

(3) Before making an application under subsection 1 of section 28 of *The Planning Act*, the owner of a property or someone authorized by him in writing may apply to the Minister to have the description or any part of the description exempted from section 28, or from any provision thereof, and where in the opinion of the Minister such exemption is appropriate in the circumstances, he may grant the exemption.

R.S.O. 1960,
c. 296, s. 29,
not to apply

(4) Section 29 of *The Planning Act* does not apply in respect of descriptions made for the purposes of this Act.

REGULATIONS

Regulations

25.—(1) The Lieutenant Governor in Council may make regulations,

R.S.O. 1960,
cc. 204, 348

- (a) classifying properties for the purposes of the regulations;
- (b) prescribing the duties of officers appointed under *The Land Titles Act* or *The Registry Act* for the purposes of this Act;
- (c) governing the method of describing in instruments a property or any part of a property;
- (d) governing surveys, structural plans, descriptions and diagrams, and prescribing procedures for their registration;
- (e) requiring, in respect of any class of properties, in lieu of or in addition to the requirements of section 4, surveys of the properties showing the units and common elements;
- (f) respecting the registration and recording of declarations, descriptions, by-laws, notices of termination and other instruments;
- (g) respecting the names of corporations;

- (h) respecting additions to the common elements;
- (i) requiring the payment of fees to officers appointed under *The Land Titles Act* or *The Registry Act*,^{R.S.O. 1960, cc. 204, 348} and prescribing the amounts thereof;
- (j) prescribing forms and providing for their use;
- (k) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

(2) Any provision of any regulation may apply to all^{Application of regulations} properties or to any class of properties.

MISCELLANEOUS

26. This Act comes into force on a day to be named by^{Commence-ment} the Lieutenant Governor by his proclamation.

27. This Act may be cited as *The Condominium Act, 1967*.^{Short title}

